and gives sworn evidence.

On the submission of counsel for the respondent that the court has a discretion to waive the requirement of pre-trial notice, I regret to say that the authorities cited in support of the proposition, viz. *R.* v. *Hassan*;[6] *R.* v. *Sullivan*[7] and *R.* v. *Lewis*[8] are not applicable here, as these authorities are based on section 11 of the English Criminal Justice Act, 1967, which is not *in pari materia* with our section 402A. The fact that in England the court has the last say is inherent from subsection (1) of section 11 itself which provides:

"On a trial on indictment the defendant shall not without the leave of the court adduce evidence in support of an alibi unless, before the end of the prescribed period, he gives notice of particulars of the alibi."

The ample discretion given to English courts to grant leave is made even more clear by subsection (3) which provides:

"The court shall not refuse leave under this section if it appears to the court that the defendant was not informed in accordance with rules under section 15 of the Justices of the Peace Act 1949 (rules of procedure for magistrate's courts) of the requirements of this section."

Since the defence in the present case had failed to comply with the prerequisite of section 402A(1), the evidence given by the accused, DW2, DW3 and DW4 in support of the defence of alibi was wholly inadmissible in evidence notwithstanding the fact that statements on the alibi had been recorded by the police from two of them — Sadimin and Krishnan. In my judgment, the requirement of pre-trial notice is mandatory and the courts here have no discretion in the matter. Whether or not the police have taken statements from the alibi witnesses in the course of their investigation is irrelevant. Without the alibi evidence, the learned Magistrate would not have found that the defence had created a doubt in the prosecution case. I would therefore allow this appeal; set aside the order of discharge and acquittal. I order that a finding of guilt with conviction under the charge be recorded. Since this case has been pending since October 10, 1978, when the accused was first produced in court, I do not think a custodial sentence should be imposed, although the offence committed was a serious one. Since the accused is a first offender, a fine of $1,000 in default six months' imprisonment is imposed.

Appeal allowed.

Solicitors: *K. Chandra & Co.*

LEE YEE SENG & ORS. v. GOLDEN STAR VIDEO BHD.

[O.C.J. (Chan J.) March 12, 1981]

[Kuala Lumpur — Originating Summons No. C 8 of 1981]

Copyright — Declaration — "Author" — Work whose author is not a citizen — Foreigner not permanent resident or resident of country — Copyright Act, 1969, ss. 2(2)(a), 5, 6(1)(a) & 7.

In this case the shops of all the five plaintiffs were raided by the police and the video tapes (which were thought to have infringed the copyright of the defendant) that were found on the premises were seized. Three of the directors of the 4th, 5th and 6th plaintiffs were arrested and later released on bail of $10,000 each. Two of the directors were subsequently charged before a magistrate and their cases were pending. On January 20, 1981 the plaintiffs took out an originating summons in the Commercial Division of the High Court to secure a declaration that copyright should not subsist in a work under section 6(1)(a) of the Copyright Act, 1969 if a foreigner is not a permanent resident or resident in the country.

Held: (1) the word "author" has no nationality. It means exactly what it says. It is an originator, like the author of a book. It does not mean a local author or an author who is a citizen nor could it mean someone who is not a foreigner. The word "author" could not mean a resident author or a foreign author who was present in the country;

(2) this was not a proper case in which the discretion of the court should have been exercised to make the declaration sought for by the plaintiffs.

Cases referred to:-

(1) *Jeffreys* v. *Boosey* (1854) 4 H.L.C. 815; 10 E.R. 681.
(2) *Routledge* v. *Low* (1868) L.R. 3 H.L. 100.
(3) *Thompson* v. *Goold and Co.* [1910] A.C. 409, 420.
(4) *Vickers, Sons & Maxim* v. *Evans* [1910] A.C. 444, 445.
(5) *Falcon* v. *Famous Players Film Co.* [1926] 1 K.B. 393, 403.
(6) *Bodley Head* v. *Flegon* [1972] 1 W.L.R. 680.
(7) *Imperial Tobacco Ltd.* v. *Attorney-General* [1980] 2 W.L.R. 466; [1980] 1 All E.R. 866.

ORIGINATING SUMMONS.

Wong Chong Wah and *Lee Tat Boon* for the plaintiffs.

M. Shankar and *S.F. Wong* for the defendant.

Mah Weng Kwai and *Muhammad Shafee* for the Attorney-General as *amicus curiae*.

Cur. Adv. Vult.

Chan J.: On January 20, 1981, the plaintiffs took out an originating summons in the Commercial Division of the High Court to secure a declaration that copyright shall not subsist in a work under section 6(1)(a) of the Copyright Act, 1969 if the author is not a citizen of Malaysia or, if a foreigner, is not a permanent resident or resident in this country.

Copyright

By section 6(1) of the Copyright Act, 1969:

"Copyright shall be conferred by this section on every work which is eligible for copyright and which —

(a) being a literary, musical or artistic work or cinematograph film is first published in Malaysia."

Section 2(2)(a) of the Act provides that

"a work shall be deemed to have been published if a copy or copies thereof have been made available with the consent of the author in a manner sufficient to satisfy the reasonable requirements of the public."

By section 2 of the Act, "author" means, in the case of a cinematograph film, the person by whom the arrangements for the making of the film were undertaken.

It is common ground that a video recording is a "cinematograph film" within the meaning of the Act.

It is clear from reading the above provisions of the Copyright Act that if the publication of the video recording was in fact the first publication of such recording in this country with the consent of the author, then, by virtue of section 6(1)(a) of the Copyright Act, 1969, copyright subsists in this country. Put in another way, the Act provides that copyright shall subsist in a work if the work is first published in Malaysia with the consent of the author.

Mr. Wong for the plaintiffs relied on *Jeffreys* v. *Boosey.*[1] In that case the House of Lords seems to have decided that the word "author" in the statute of 8 Anne, c.19, is only applicable to a foreigner if at the time of first publication he is a resident or is present in England. Mr. Wong argued that applying *Jeffreys* v. *Boosey* the work must be first published in Malaysia with the consent of the author who must be a citizen of Malaysia, or, if he is a foreigner he must be resident in this country. With respect, I cannot agree. The word "author" has no nationality. In *Routledge* v. *Low,*[2] Lord Westbury said (at 118):

"The question then arises who are included in the term 'authors'. The word is used in the statute without limitation or restriction. It must therefore include every person who shall be an 'author', unless from the rest of the statute sufficient grounds can be found for giving the term a limited signification."

The word "author" means exactly what it says it is — an originator, like the author of a book. It does not mean a local author or an author who is a citizen nor could it mean someone who is not a foreigner. Definitely, the word "author" cannot mean a resident author or a foreign author who is present in this country.

"It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do" said Lord Mersey in *Thompson* v. *Goold and Co.*[3] Lord Loreburn L.C. in *Vickers, Sons & Maxim* v. *Evans*[4] at 445, said:

"We are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself."

I am not prepared to read into the Copyright Act, 1969 words which are not there.

"I think that the decision in *Jeffreys* v. *Boosey* must be taken to have turned on the wording, scope, and circumstances of that particular statute. That was the view of Lord Westbury and Lord Cairns in *Routledge* v. *Low* when dealing with the Copyright Act, 1842" said McCardie J. in *Falcon* v. *Famous Players Film Co.*[5] at 403.

In *Routledge* v. *Low,* Lord Cairns said (at 111):

"That case was decided not upon the present Copyright Act but upon the old Copyright Act of Queen Anne ... it is impossible not to see that the *ratio decidendi* in that case proceeded mainly, if not exclusively, on the wording of the preamble of the statute of Anne, and on a consideration of the general character and scope of the legislation of Great Britain at that period."

And Lord Westbury said (at 117):

"My Lords, the case of *Jeffreys* v. *Boosey* is a decision which is attached to and depends on the particular statute of which it was the exponent; and as that statute has been repealed, and is now replaced by another Act, with different enactments expressed in different language, the case of *Jeffreys* v. *Boosey* is not a binding authority in the exposition of this later statute."

Jeffreys v. *Boosey* is no authority for the proposition put forward on behalf of the plaintiffs. It was a case decided in 1854 on the wording, scope, and circumstances of the statute of 8 Anne, c.19. It was not followed, in fact, it was disapproved by Lord Cairns and Lord Westbury in *Routledge* v. *Low* when dealing with the Copyright Act, 1842. The other three Law Lords in that case thought it was unnecessary to decide on the correctness of the decision of *Jeffreys* v. *Boosey.*

McCardie J. in *Falcon* v. *Famous Players Film Co.* did not follow *Jeffreys* v. *Boosey* when coming to his decision under the Dramatic Copyright Act, 1833. He said (at 404):

"I hold that under the Act of 1833 a foreign author dwelling outside British territory could, in law, secure dramatic copyright within the British Empire if the first performance was given in this country. I am glad to feel that my opinion is agreeable to the view of the profession.... I am strengthened in my opinion by the passage in *Copinger,* 4th ed. page 97 where it is said 'It is therefore only reasonable to suppose that when this question next arises, our Courts will give their decision in accordance with the views expressed by Lord Cairns and Lord Westbury in the case of *Routledge* v. *Low.*' Finally, I may point out that my opinion is, I think, supported by *Scrutton* on Copyright, 4th ed. pages 128 and 129 and by the view of the law officers of the Crown in 1891 as stated in *Macgillivray's* Law of Copyright, page 45."

Jeffreys v. *Boosey* had not been followed since.

In the recent case of *Bodley Head* v. *Flegon,*[6] a Russian author signed a power of attorney in Moscow authorising a Swiss lawyer to deal, outside Russia, with his literary works. The plaintiff was given the exclusive licence to publish a novel by the Russian author. It was held that the book was not first published in Russia, there being no evidence of any clandestine publication (samizdat) of the novel there. However, the publication of the author's work in France constituted "first publication", so that the plaintiff was entitled to copyright in the United Kingdom. Brightman J. said (at 683H):

"Put shortly, the Act provides that copyright shall subsist in a work if the work is first published in the United Kingdom.... An Order in Council, however, may be made under section 32 applying the provisions of the Act, where first publication takes place in a foreign country.... France is one of the countries in relation to which the relevant provisions of the Copyright Act, 1956 have been extended so as to confer copyright in this country if first publication takes place in France. Russia is not a country specified in any such Order in Council, so that first publication in Russia would not cause any copyright to subsist under English law. It is not in dispute that the author is a Russian subject domiciled and resident in Russia."

(See also *Copinger,* 12th edition page 31 paragraph 79).

In respect of a literary or musical work, the position in English law appears to be not much more

different from our section 6(1)(a) with regard to first publication. Section 2(2) of the English Copyright Act, 1956 reads:

"Where an original literary, dramatic or musical work has been published, then, subject to the provisions of this Act, copyright shall subsist in the work... if, but only if, —

(a) the first publication of the work took place in the United Kingdom, or in another country to which this section extends."

The position with regard to cinematograph film is different, see section 13(1) and (2) of the English Act. Under subsection (1) the maker of the film must be a qualified person. Subsection (2) is "without prejudice to the preceding subsection."

Counsel for the plaintiffs has taken the further point that section 6 of the Act should be read with section 5. Section 5 specifies that the "author" must be a "qualified person", that is to say, "an individual who is a citizen of, or is a permanent resident in Malaysia".

There is no merit in this submission whatsoever. Sections 5, 6 and 7 of the Act are three distinct and different provisions in which copyright can be obtained. They are three alternative ways, separate and distinct in which copyright could be conferred. (See the opening words of each of the three sections: "Copyright shall be conferred *by this section*")

Discretion

The shops of all the five plaintiffs were raided by the police and those video tapes (which were thought to have infringed the copyright of the defendant) that were found on the premises were seized. Three of the directors of the 4th, 5th and 6th plaintiffs were arrested and later released on bail of $10,000 each. Two of the directors were subsequently charged before a Magistrate and their cases are pending.

In all these cases, I hold as a matter of law that criminal proceedings had already been commenced. I am of the view that this is not a proper case in which the discretion of the court should have been exercised to make the declaration sought for by the plaintiffs. I am fortified in this by the recent decision of the House of Lords in *Imperial Tobacco Ltd.* v. *Attorney-General.*[7]

Lord Lane said (at 487):

"Counsel appearing before your Lordships' House were unable to find any case in which a defendant in criminal proceedings already properly and not vexatiously instituted had applied for a declaration that the criminal proceedings were unfounded or based on a misapprehension as to the true meaning of the criminal statute. I do not find that dearth of authority surprising. It would be strange if a defendant to proper criminal proceedings were able to pre-empt those proceedings by application to a judge of the High Court whether sitting in the Commercial Court or elsewhere. What effect in law upon the criminal proceedings would any pronouncement from the High Court in these circumstances have? The criminal court would not be bound by the decision. In practical terms it would simply have the inevitable effect of prejudicing the criminal trial one way or the other.

Where there are concurrent proceedings in different courts between parties who for practical purposes are the same in each, and the same issue will have to be determined in each, the court has jurisdiction to stay one set of proceedings if it is just and convenient to do so or if the circumstances are such that one set of proceedings is vexations and an abuse of the process of the court. Where, however, criminal proceedings have been properly instituted and are not vexatious or an abuse of the process of the court it is not a proper exercise of the court's discretion to grant to the defendant in those proceedings a declaration that the facts to be alleged by the prosecution do not in law prove the offence charged."

What then are the facts to be alleged by the prosecution? There are many and this court would not know what they are. One thing is sure, the prosecution will have to prove the first publication in Malaysia and that such publication was made with the consent of the "author". It would therefore not be right to grant a declaration after criminal proceedings have started.

The application is therefore dismissed with costs.

Application dismissed.

Solicitors: *Skrine & Co.; Chooi & Co.*

J. SELVAM & ANOR. v. S. MEHTA & ANOR.

[O.C.J. (Abdul Hamid F.J.) April 2, 1980]
[Kuala Lumpur — Civil Suit No. 3 of 1980]

Landlord and Tenant — Distress — Appellants not landlord of respondents — Warrant of distress set aside.

The present appeal was against the decision of the learned Magistrate setting aside the Warrant of Distress on the ground that the appellants were not the landlord of the respondents. On February 22, 1979, the appellants obtained a Warrant of Distress for the movable property found on the ground floor of No. 40 Jalan Tuanku Abdul Rahman to recover a sum of $10,050 being 3 months' rent in arrears. The appellants claimed that they were owners and landlord of the said premises. They claimed that the respondents were their tenants at a monthly rental of $3,350.

On March 3, the respondents applied to set aside the order. They contended that they were not the tenants of the appellants but of Selvam Holdings (M) Sdn. Bhd.

The learned Magistrate found as a fact that Selvam Holdings were the chief tenants and also landlord of the said premises and the appellants were not, therefore, the proper party to apply for the issue of the Warrant of Distress.

Held, dismissing the appeal: (1) the learned Magistrate had arrived at a correct decision and it should not be interfered with. It was immaterial that the appellants were the registered proprietors of the said premises;

(2) the facts showed that at all material times Selvam Holdings were the chief tenants and in that capacity had held themselves out as landlord of the said premises; therefore, in so far as the tenancy was concerned it was strictly a matter between the respondents and Selvam Holdings and if a Warrant of Distress had to be applied for, it should have been at the instance of Selvam Holdings.

CIVIL SUIT.

G. Ambiavagar (Miss) for the appellants.

K.L. Rekhraj for the respondents.

Cur. Adv. Vult.

Abdul Hamid F.J.: The appeal is against the decision of the Magistrate at Kuala Lumpur on May 9, 1979 setting aside the Warrant of Distress on the ground that the appellants were not the landlord of the respondents.

The appellants obtained a Warrant of Distress for the movable property found on the ground floor